

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**SONTAY T. SMOTHERMAN, r,**

**Plaintiff,**

**v.**

**Civil Action 2:19-cv-4505  
Judge Sarah D. Morrison  
Magistrate Judge Chelsey M. Vascura**

**DENISE N. ERRETT,**

**Defendant.**

**REPORT AND RECOMMENDATION**

This matter is before the United States Magistrate Judge for a Report and Recommendation on the Court's October 31, 2019 Order and Notice of Deficiency. (ECF No. 7.) For the reasons that follow, it is **RECOMMENDED** that Plaintiff's action be **DISMISSED WITHOUT PREJUDICE** pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute.

On October 9, 2019, Plaintiff commenced this action. (ECF No. 1.) On October 31, 2019, the Court entered an Order and Notice of Deficiency, pointing out that Plaintiff had not paid the requisite \$400 filing fee or filed an application to proceed *in forma pauperis* under 28 U.S.C. §1915. (ECF No. 7.) Plaintiff was cautioned that if he intended to pursue this action, he must either pay the \$400 filing fee or file a properly supported application to proceed *in forma pauperis* by November 14, 2019. Plaintiff was also cautioned that failure to comply with the Court's Order would result in dismissal of his action for failure to prosecute. (*Id.*) To date, Plaintiff has failed to comply with the Court's October 31, 2019 Order.

Additionally, the Court notes that mail sent to Plaintiff was returned as undeliverable. (ECF No. 8.) Plaintiff has an affirmative duty to notify the Court of any change in address. *See Barber v. Runyon*, No. 93-6318, 1994 WL 163765, at \*1 (6th Cir. May 2, 1994) (“If [*pro se* Plaintiff’s] address changed, she had an affirmative duty to supply the court with notice of any and all changes in her address.”); *see also Jourdan v. Jabe*, 951 F.2d 108, 109 (6th Cir. 1991) (“[W]hile *pro se* litigants may be entitled to some latitude when dealing with sophisticated legal issues . . . there is no cause for extending this margin to straightforward procedural requirements that a layperson can comprehend.”); *Walker v. Cognis Oleo Chem., LLC*, No. 1:07cv289, 2010 WL 717275, at \*1 (S.D. Ohio Feb. 26, 2010) (“By failing to keep the Court apprised of his current address, Plaintiff demonstrates a lack of prosecution of his action.”).

Under the circumstances presented in the instant case, the undersigned recommends dismissal of Plaintiff’s action pursuant to Rule 41(b) for failure to prosecute. The Court’s inherent authority to dismiss a plaintiff’s action with prejudice because of his or her failure to prosecute is expressly recognized in Rule 41(b), which provides in pertinent part: “If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an adjudication on the merits.” Fed. R. Civ. P. 41(b); *Link v. Walbash R.R. Co.*, 370 U.S. 626, 629–31 (1962). “This measure is available to the district court as a tool to effect ‘management of its docket and avoidance of unnecessary burdens on the tax-supported courts [and] opposing parties.’” *Knoll v. AT & T*, 176 F.3d 359, 363 (6th Cir. 1999) (internal citations omitted).

The Sixth Circuit directs the district courts to consider the following four factors in deciding whether to dismiss an action for failure to prosecute under Rule 41(b):

(1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.

*Schafer v. City of Defiance Police Dep't*, 529 F.3d 731, 737 (6th Cir. 2008) (citing *Knoll*, 176 F.3d at 363). “Although typically none of the factors is outcome dispositive, . . . a case is properly dismissed by the district court where there is a clear record of delay or contumacious conduct.” *Schafer*, 529 F.3d at 737 (quoting *Knoll*, 176 F.3d at 363).

Here, Plaintiff failed to comply with the Court's Order instructing him to either pay the \$400 filing fee or submit an application to proceed *in forma pauperis*. (Order and Notice of Deficiency, ECF No. 7.) Moreover, the Court explicitly cautioned Plaintiff that failure to comply would result in dismissal of this action for failure to prosecute. *See Stough v. Mayville Cnty. Schs.*, 138 F.3d 612, 615 (6th Cir. 1998) (noting that “[p]rior notice, or the lack thereof, is . . . a key consideration” in whether dismissal under rule 41(b) is appropriate). Plaintiff's failure to timely comply with the clear order of the Court, which established reasonable deadlines for compliance, constitutes bad faith or contumacious conduct. *See Steward v. Cty. of Jackson, Tenn.*, 8 F. App'x 294, 296 (6th Cir. 2001) (concluding that a plaintiff's failure to comply with a court's order “constitute[d] bad faith or contumacious conduct and justify[d] dismissal”).

Because Plaintiff has missed this deadline and disregarded the Court's Order, the undersigned concludes that no alternative sanction would protect the integrity of the pretrial process.

Nevertheless, the undersigned concludes that dismissal with prejudice and requiring Plaintiff to pay the filing fee is too harsh a result. It is therefore **RECOMMENDED** that the Court

**DISMISS PLAINTIFF'S ACTION WITHOUT PREJUDICE** under Rule 41(b). It is further **RECOMMENDED** that the Court not assess the filing fee to Plaintiff in this matter. Finally, it

is **RECOMMENDED** that the Court order Plaintiff to list this action as a related case if he re-files.

### **PROCEDURE ON OBJECTIONS**

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A Judge of this Court shall make a *de novo* determination of those portions of the Report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a Judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the District Judge review the Report and Recommendation *de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Chelsey M. Vascura  
CHELSEY M. VASCURA  
UNITED STATES MAGISTRATE JUDGE